Supreme Court, U.S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1979

CARPENTERS DISTRICT COUNCIL OF SOUTHERN COLORADO and its affiliated LOCAL UNION 1340 of the United Brotherhood of Carpenters & Joiners of Amercia, AFL-CIO,	)	79-1712
Petitioners,	)	NO._____
vs.	)	
REID BURTON CONSTRUCTION, INC., a Colorado Corporation,	)	
Respondent.	)	

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioners, Carpenters District Council of Southern Colorado and Local 1340 of the United Brotherhood of Carpenters & Joiners of America, respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered herein on January 31, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals as to which a writ of certiorari is sought is reported at _____ F.2d _____, 103 L.R.R.M. 2475 and appears in Appendix F. The District Court opinion affirmed in such decision is unreported and appears in Appendix E hereto. Earlier opinions of the District Court and the Court of Appeals are reported at 91 L.R.R.M. 2873 (D.Colo. 1974) and 535 F.2d 598, *cert. denied,* 429 U.S. 907 (1976), and appear, respectively, in Appendices A and B.

JURISDICTION

The Court of Appeals' judgment and opinion were dated and entered of record on January 31, 1980, affirming the judgment of the District Court. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Where there was no intentional or express waiver of an arbitration defense in a §301 action for breach of a no-strike clause, did the Court of Appeals err in concluding that the arbitration defense was constructively waived through (1) the initial denial of §301 jurisdiction by one of the Petitioners, (2) the Petitioners' active participation in pre-trial proceedings, and (3) the absence of an immediate request by the Petitioners that the action be stayed pending arbitration?

STATEMENT OF THE CASE

On July 13, 1973 the Respondent Reid Burton Construction, Inc. [hereinafter, Burton] filed a Complaint [App. C at C-1] in the United States District Court for the District of Colorado against the Petitioner Carpenters District Council of Southern Colorado [hereinafter, District Council], the Petitioner Local 1340 of the United Brotherhood of Carpenters &

Joiners of America [hereinafter, Local 1340] and the Colorado Building and Construction Trades Council [hereinafter, Building Trades Council]. The Complaint alleged jurisdiction under §301 of the Labor Management Relations Act of 1947, as amended [hereinafter, Act], 29 U.S.C. §185. [*Id.* at C-2] The Complaint stated, *inter alia*, that the District Council and Local 1340 were "parties" to and had breached certain provisions of a collective bargaining agreement with Burton "known as 'Carpenters' Agreement, Carpenters District Council of Southern Colorado'"[1] by (1) attempting to modify Burton's obligations under such agreement during its term and (2) inducing, encouraging and/or coercing employees to respect a picket line established by the Building Trades Council. [*Id.* at C-3-4] The Complaint was silent as to the existence, if any, of grievance and/or arbitration provisions in the collective bargaining agreement.

All Defendants filed motions to dismiss pursuant to Fed.R.Civ.P. 12 [*Id.* at C-6-7] The District Council and Local 1340 did not, in their motion or brief in support thereof, note the existence of arbitration provisions in the collective bargaining agreement but did argue that the injunctive relief requested in Burton's Complaint was barred under the Norris-LaGuardia Act, 29 U.S.C. §101 *et seq.*, in the absence of allegations satisfying the criteria for injunctive relief set forth in *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235, 254 (1970) [*Id.* at C-14-15] On September 14, 1973 Burton filed an Amended Complaint deleting all requests for injunctive relief. [*Id.* at C-16] The District Court subsequently denied the District Council and Local 1340's Motion to Dismiss, and on November 9, 1973 each defendant answered the Amended

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[1]The correct denomination of the collective bargaining agreement was "Carpenters Building Construction 1972-1975 Agreement — Carpenters District Council of Southern Colorado."

Complaint. [*Id.* at C-21] Their Answers admitted jurisdiction under §301 as to the District Council and denied jurisdiction thereunder as to Local 1340. Their Answers further admitted that the District Council was a party to the collective bargaining agreement but denied such status as to Local 1340. [*Id.*] Their Answers asserted ten affirmative defenses, the third of which read:

> "This Court has no jurisdiction over the subject matter of this action because it involves the interpretation and application of the collective bargaining agreement. . .which is within the sole and exclusive province of the dispute resolution machinery contained therein which provisions contain the exclusive remedy for breaches thereof." [*Id.* at C-25]

Joined with their Answers was a Counterclaim by the District Council alleging, *inter alia* that Burton, by failing to pursue the grievance and arbitration procedures contained in the collective bargaining agreement, was in violation of the agreement. [*Id.* at C-27] Burton's Reply to the Counterclaim affirmatively alleged that the "Defendants' [*sic*] Counterclaim is barred by the application of the doctrine of laches." [*Id.* at C-77] The Reply further alleged that the Counterclaim itself was subject to the grievance and arbitration procedures of the collective bargaining agreement and that the District Court was, as a consequence, without jurisdiction over it! [*Id.*]

Burton's Reply to the District Council's Counterclaim was filed on December 5, 1973. On March 11, 1974 the parties filed Pre-Trial Statements which, generally speaking, reiterated the several positions assumed in the earlier pleadings. [*Id.* at C-21, 32] Burton's Pre-Trial Statement, however, did not mention any issue of arbitration as a question of law or fact to be

determined by the Court. [*Id.* at C-31-32] The District Council and Local 1340's Pre-Trial Statement certified as issues of fact and law questions dealing with the arbitrability of the subject matter of the Amended Complaint. [*Id.* at C-34-39] On July 19, 1974 the District Council and Local 1340 filed with the District Court a Suggestion to Dismiss pursuant to Fed.R.Civ.P. 12(h)(3) and a supporting brief, arguing that Burton's claim was subject to mandatory resolution through the grievance and arbitration provisions of the collective bargaining agreement. [*Id.* at C-40-41] In the supporting brief the District Council and Local 1340 stated, "[a]lthough heretofore the Defendants have questioned whether the Defendant Local 1340 was a party to the collective bargaining agreement entered into by Reid Burton and the Carpenters District Council of Southern Colorado, the Defendants herein state that Local 1340 is subject to the terms and provisions of the agreement. . . .As a consequence, both Defendant Carpenters District Council of Southern Colorado and Defendant Local 1340 would be bound by an arbitral award issued in accordance with the provisions of Article XIV of the collective bargaining agreement." [*Id.* at C-44] Simultaneously, the District Council and Local 1340 filed an Amended Pre-Trial Statement which, *inter alia*, admitted §301 jurisdiction as to Local 1340 but denied that it was a "party" to the collective bargaining agreement. [*Id.* at C-44,46] Burton then filed an additional Pre-Trial Statement on July 23, 1974 which, as its initial Pre-Trial Statement, was silent as to any issue involving the arbitrability of the subject matter of its Amended Complaint or the Counterclaim.

On September 23, 1974 the Court entered a lengthy Pre-Trial Order. The Pre-Trial Order did not list as a contested issue of fact or law any equitable defense by Burton to its obligation to arbitrate. On the first day of trial, however, Burton raised the equitable defense issue in its Trial Brief, noting that,

"[u]ntil recently, Defendant Local 1340 was denying it was party to the collective bargaining agreement. Thus, because of the pleading tactics of the Defendant Union [*sic*], the matter has progressed up to the point of trial and therefore the right to arbitrate, if it ever existed, should be deemed waived." [*Id.* at C-75] During the trial, counsel for the District Council and Local 1340 stated, in response to questions from the District Court, that arbitration of Burton's claim should be ordered pursuant to *Boys Markets* and further stated that no such affirmative request for arbitration had been made by the District Council and Local 1340 until so requested "today" by the Court. However, counsel also stated that the District Council anl Local 1340 had consistently maintained their arbitration defense since the filing of their Answers and the concomitant position that resolution of Burton's claim was exclusively subject to the grievance and arbitration provisions of the collective bargaining agreement. [App. F at F-4]

On November 19, 1974 the District Court issued its Memorandum Opinion in which it made "findings and conclusions on all questions directly or indirectly, and properly or improperly before me." [App. A at A-4-5] Included in such findings and conclusions was a determination that the District Council and Local 1340 had "flagrantly violated" the no-strike provision of the collective bargaining agreement and that Burton had been damaged thereby in the amount of Ten Thousand Eight Hundred One Dollars and Ninety-Seven Cents ($10,801.97). [*Id.* at A-10] The District Court nonetheless then held that the arbitration provisions of the collective bargaining agreement were broad enough to encompass employer-initiated grievances alleging breach of its no-strike provisions. The court further held that *Operating Engineers Local 150 v. Flair Builders, Inc.*, 406 U.S. 487 (1972), required that an arbitrator determine "whether defendants can insist on arbitration in

light of their conduct leading up to and during this case." [*Id.* at A-11]

The Court of Appeals sustained the District Court's resolution of those issues dealing with whether the grievance and arbitration provisions of the collective bargaining agreement admitted resolution for employer-initiated grievances alleging breach of its no-strike provisions. However, the Court of Appeals reversed the District Court as to its determination that an arbitrator should resolve all equitable defenses raised by Burton to its duty to arbitrate. Specifically, the Court of Appeals remanded the case to the District Court for determination of "whether the union should be prevented from demanding arbitration because of 'evasive' and 'dilatory' pleading practices before the court." [App. B at B-12]

No further evidence was taken upon remand, and the District Court determined the waiver issue on the record made during the intitial proceedings. Upon such record the District Court concluded that the District Council and Local 1340 were prevented from maintaining their arbitration defense because of "evasive" and "dilatory" pleading tactics. The Court stated that it took a "dim view of the Defendants' whirlygig positions during the course of the litigation." [App. E at E-3] It then stated that "I think that advertantly or inadvertantly the Court and Plaintiff's counsel were led down a primrose path by a failure on the part of Defendants' counsel to communicate to the Court and opposing counsel in a timely way the argument of Defendant that this dispute was one subject to arbitration." [*Ibid.*] Although the reasoning behind such conclusion was not entirely clear, the District Court appeared to base its decision on Defendant Local 1340's admission to §301(a) jurisdiction in July, 1974 and its failure to state earlier in the proceedings that, while not a party to the collective bargaining agreement,

it was bound by such agreement's terms. The Court of Appeals affirmed the District Court, applying the clearly erroneous standard to the District Court's conclusions. In relevant part it stated:

> "...[W]e cannot say that the finding of waiver by Defendants District Council and Local 1340 was clearly erroneous. We find the initial and consistent denial for one year of Local's status as a party; the ambiguous or confusing ultimate stance on this point; Defendants' participation in numerous hearings, pretrial conferences, motions and other pleadings, and the deposing of witnesses; and their assertion of the arbitration clause merely as a defense in bar and a counterclaim, without insisting upon or demanding immediately, as was their duty, ...enforcement of that provision." [App. F at F-10]

REASONS FOR GRANTING WRIT

THE COURT OF APPEALS' DECISION CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS ON THE QUESTION OF WAIVER OF THE ARBITRATION DEFENSE AND FAILS TO CONSIDER MEANINGFULLY THE STRONG FEDERAL POLICY FAVORING ARBITRATION OF LABOR DISPUTES. THE DECISION, MOREOVER, PRESENTS AN ISSUE OF SUBSTANTIAL FEDERAL IMPORTANCE WHICH HAS NOT BEEN, BUT SHOULD BE, DETERMINED BY THIS COURT.

I.

Commencing with *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), this Court has evolved an intricate body of federal substantive law under §301 of the Act. The core prin-

ciple governing such evolution has been the Court's recognition of §301's integral importance to the maintenance of labor peace. Thus, the term "contract" in §301(a) has been expansively contrued to include all agreements "between employers and labor organizations significant to the maintenance of labor peace between them." *Retail Clerks Local 128 v. Lion Dry Goods, Inc.*, 397 U.S. 1728 (1962). *Lincoln Mills* itself clearly determined that specific performance of contractual undertakings served such purpose. 353 U.S. at 455. Of particular relevance instantly is that the contractual undertaking sought to be specifically enforced in *Lincoln Mills* was an agreement to arbitrate disputes. *Id.* at 449. Decisions of the Court subsequent to *Lincoln Mills* have firmly established labor arbitration as the prime means of effecting §301's objectives. *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Company*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corporation*, 363 U.S. 593 (1960); *Drake Bakeries, Inc. v. Bakery Workers Local 50*, 370 U.S. 254 (1962); *Teamsters Local 174 v. Lucas Flour Company*, 369 U.S. 95 (1962); *Carey v. Westinghouse Electric Corporation*, 375 U.S. 261 (1964); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964); *Boys Markets, Inc. v. Retail Clerks Local 770, supra; Operating Engineers Local 150 v. Flair Builders, Inc., supra; Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974); *Buffalo Forge Company v. United Steelworkers*, 428 U.S. 397 (1976); *Nolde Bros., Inc. v. Bakery Workers Local 358*, 430 U.S. 243 (1977). However, "[a]rbitration is a stabilizing influence only as it serves as a vehicle for handling any and all disputes that arise under the agreement." *United Steelworkers v. American Manufacturing Company*, 363 U.S. at 567.

The significance of the above policies to the instant petition is apparent. To the extent that constructive "equitable"

defenses to the duty to arbitrate are recognized, even with respect to "in-trial conduct," the federal commitment to arbitration of labor disputes is affected. If murky parameters are set as to the circumstances under which such equitable defenses can be sustained, incentive will be created for parties to seek direct recourse to the judicial process in the hope that the course of litigation will present a fortuitous, equitable defense to their duty to arbitrate. Indeed it was the Plaintiffs who proceeded directly to court in the within matter. It was the Defendant unions who initially raised the existence of the parties' mutual obligations to resolve the dispute through arbitration. Maintenance of §301's objectives can only be achieved by relegating the parties to the contractually prescribed arbitral forum except under the most compelling proof of intentional abandonment of the arbitration defense or of intentional misrepresentation of position directly related to the duty to arbitrate. Where, as here, the District Council and Local 1340 have raised in a procedurally proper and timely fashion the arbitration defense and where there is no finding of intentional misrepresentation of position as to such defense, the federal policy of favoring arbitration of labor disputes must be given effect.

The Court of Appeals, while noting in passing the strong federal policy favoring arbitration of labor disputes,[2] concluded that the District Council and Local 1340 had waived their right to compel Burton to pursue its claim through the applicable grievance and arbitration procedure by (1) denial of Local 1340's status as a "party" to the collective bargaining agreement; (2) active participation in various aspects of the litigation; and (3) assertion of the arbitration provision as an affirmative defense and counterclaim "without insisting upon or demanding immediately, as was their duty. . . , enforcement of

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[2]App. F at F-8

that provision." [App. F at F-10] The Court of Appeals did not, however, point to any conduct which reflected an intentional relinquishment or abandonment by the District Council and Local 1340 of the arbitration defense; rather, its conclusion that waiver existed was premised on a finding of constructive waiver and was derived largely from cases applying §3 of the Federal Arbitration Act, 9 U.S.C. §3.[3] The Court of Appeals' reasoning conflicts with decisional authority from other circuits and raises a substantial federal question as to what burden a party to a collective bargaining agreement has in asserting the defense that the subject matter of a civil action is subject to mandatory and binding arbitration.

II.

Neither the District Court nor the Court of Appeals concluded that the denial of Local 1340's "party" status to the collective bargaining agreement was asserted in bad faith or was

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[3]The Court of Appeals applied the "clearly erroneous" standard to the District Court's "findings." [App. F at F-11]. However, as indicated in the text, the District Court's decision was predicted on the pleadings and certain statements made by counsel during trial. "This was essentially a 'paper case.' It did not unfold by the testimony of 'live' witnesses. . . ." *U.S. v. General Motors Corp.*, 384 U.S. 127, 141n.16 (1966); *accord, In re Clemens*, 472 F.2d 939, 94ln.l (6th Cir. 1972); *see generally U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 394-95 (1948). As further noted by Justice Fortas in *General Motors*, "the question here is not one of 'facts,' but consists rather of the legal standard required to be applied to the undisputed facts of the case. . . ." *Ibid.* There is instantly no question that the District Council and Local 1340 did not, as a matter of fact, waive the arbitration defense; *i.e.*, intentionally relinquish the right to assert such defense. The absence of such waiver is unequivocally established through a review of the pleadings. The issue herein is, instead, whether, *as a matter of law*, the arbitration defense should be deemed constructively waived because of, most significantly, the absence, until trial, of a request by the District Council and Local 1340 that arbitration be ordered. There is, of course, no question that the District Council and Local 1340 had previously asserted and maintained their position that Burton's claim for breach of the no-strike clause should be dismissed because of its obligation to arbitrate such claim rather than to present it to the District Court for resolution.

designed to delay the proceedings.[4] The subsequent admission of §301 jurisdiction by Local 1340 was, importantly, of no significance as to whether the arbitration defense, asserted by both it and the District Council, was valid. Manifestly, if §301 jurisdiction was present, it could only derive from the collective bargaining agreement which provided for final and binding arbitration. If, conversely, §301 jurisdiction had not been present as to Local 1340, the action would have been dismissed as against it. In either instance, however, the District Council would have remained as a party to the action and the arbitration defense would necessarily have been determined.

In *Controlled Sanitation Corp. v. Machinists District 128*, 524 F.2d 1324 (3d Cir. 1975), *cert. denied*, 424 U.S. 915 (1976), the Third Circuit rejected a plaintiff's argument that a defendant Union, which preserved through trial the dual defenses that it was not bound by a collective bargaining agreement but that, if it were, the plaintiff's claim was subject to mandatory arbitration, had thereby waived the arbitration defense. The defendant had initially moved to dismiss the action on the basis that no collective bargaining agreement existed between itself and the plaintiff; this motion was denied with the District Court noting the defendant's failure to seek a stay pending arbitration. The plaintiff then filed an amended complaint, and the defendant again moved to dismiss on the basis that no collective bargaining agreement existed and, alterna-

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[4]The significance of the "party" status issue to the District Council and Local 1340 lay in their desire to take no position which, either in this litigation or in later controversies, would undermine the exclusive authority of the District Council to administer the collective bargaining agreement, including the grievance and arbitration provisions of that agreement. *See United Mine Workers 12405 v. Martin Marietta Corp.*, 328 F. 2d 945, 948 (7th Cir. 1964); *Longshoremen's Local 13 v. Pacific Maritime Ass'n*, 441 F.2d 1061, 1064 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972); *see also Black-Clausen Co. v. Machinists Local* 355, 313 F.2d 179, 184 (2d Cir. 1962).

tively, that the employer was obligated to arbitrate its claim. The second motion to dismiss was denied without reaching the question of the duty to arbitrate. The denial of the second motion to dismiss came fourteen months after the filing of the complaint. The defendant thereafter filed an answer which preserved the arbitration defense. The matter proceeded to a bifurcated hearing on the questions of whether a collective bargaining agreement existed and, if so, of the amount of dam ages suffered as a result of the strikes involved. After the jury assessed damages in the amount of $208,000, the defendant moved for a new trial, asserting that, once a collective bargaining agreement had been found, all issues should have been resolved through arbitration. In a footnote the majority of the Third Circuit dismissed the employer's contention that the defendant was estopped from asserting the arbitration defense while simultaneously claiming that no collective bargaining agreement existed:

> "The Unions took the position, as has been indicated, that there was no contract and hence no arbitration agreement in existence, but they clearly reserved the right that should the Court find otherwise then the dispute should be submitted to arbitration. The Company seems to take the position that the Unions are in effect estopped from asserting such a defense because they originally insisted there was no contract. We cannot agree with this position, and it seems to be unsupported by either adequate authority or logic." *Id.* at 1328n.3.

The Court of Appeals noted *Controlled Sanitation* but "doubt[ed] the persuasiveness of the majority opinion there." [App. F at F-11n.8] The Court then stated that the decision was distinguishable since the defendants "clearly reserved the right that the dispute should be submitted to arbitration" if the

collective bargaining agreement was found applicable. [*Ibid.*] The Court of Appeals' attempt at distinguishing *Controlled Sanitation* can, however, only be sustained if the pleadings herein are ignored. Both the District Council, as to whom "party" status was not an issue, and Local 1340 preserved the arbitration defense which clearly stated that Burton's remedy for breach of contract lay exclusively under the applicable grievance and arbitration provisions.[5] Thus, while the precise facts herein may differ from those in *Controlled Sanitation*, those differences are not material to the reasoning of the Third Circuit's decision.

III.

That active participation in a civil action will, without more, give rise to constructive waiver, even under §3 of the Federal Arbitration Act, is an indefensible position.[6] *Controlled Sanitation*, although not directly addressing §3 default, clearly indicates a contrary conclusion. *See generally Carcich v. Rederi A/B Nordie*, 389 F.2d 692, 696 (2d Cir. 1968); *Robert*

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[5]See Petitioners' Answer and Counterclaim (November 9, 1973) ¶6 and Third and Eighth Affirmative Defenses [App. C at C-22-26]; Petitioners' Pre-Trial Statement (March 11, 1974), Parts 5.(A)b, 5.(B)1 and 6, 6.(A)2 and 3, 6.(B)7 and 8 [App. C at C-33-39]; Petitioners' Suggestion to Dismiss Pursuant to Rule 12(h)(3) (July 10, 1974), [App. C at C-40-44]; Petitioners' Amended Pre-Trial Statement (July 23, 1974) Parts 4, 5.(A)b, 5.(B)5, 6.(A)2, 6.(B)7 [App. C at C-45-51]; Pre-Trial Order (September 28, 1974), Parts 5.(A)b; 5.(B)b.6, 6.(A)b.2 and 3; 6.(B)b.7 [App. C at C-59-74].

[6]Section 3 reads:

> "If any suit or proceeding be brought in any of the courts of the United States upon issue referrable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referrable to arbitration under such an agreement, shall on application of one of the parties stay a trial of the action until such arbitration has been had in accordance with the terms of the agreement, *providing the applicant for the stay is not in default in proceeding with such arbitration.*" [Emphasis supplied]

Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 412-13 (2d Cir. 1959), *appeal dismissed*, 364 U.S. 801 (1960). Moreover, the within matter was, as to the arbitration defense, complicated by Burton's contention that the applicable grievance and arbitration provisions were available only to employee or union grievances and did not otherwise encompass alleged breaches of the no-strike clause. Burton pursued this position through the District Court level and to the Court of Appeals, which finally rejected it. [App. B at B- 4- 8]. There was, therefore, substantial dispute as to whether Burton's claim was subject to arbitration. Under these particular circumstances and in general, it is inconsistent with modern pleading practices to require a party to forego trial preparation because of the possibility that such preparation may result in the constructive waiver of an otherwise properly preserved defense.[7]

IV.

The Court of Appeals' decision, for the first time, conditions maintenance of an arbitration defense upon the affirmative request that the civil action be stayed and that the matter be submitted to arbitration. Such a rule is manifestly inconsistent with modern pleading practices and with the decisions of other circuits. *Shanferoke Coal & Supply Corp. v Westches-*

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[7]It should be noted that Burton had procedures available to it to avoid any alleged prejudice which might be suffered through discovery not otherwise available in arbitration. Burton could have moved to strike the arbitration defense pursuant to Fed.R.Civ.P. 12(f). *Hilti, Inc. v. Oldach*, 392 F.2d 368, 372 (1st Cir. 1968). Burton could further have moved for protective orders under Rule 26. *Econo Car Int'l, Inc. v. Antilles Car Rental, Inc.*, 61 F.R.D. 8, 10 (D.V.I. 1973), *rev'd on other grounds*, 499 F.2d 1391 (3d Cir. 1974); *Mississippi Power Co. v. Peabody Coal Co.*, 69 F.R.D. 558, 565 (S.D.Miss. 1976); *H.K. Porter Coal, Inc. v. Steelworkers Local 37*, 400 F.2d 691, 695-96 (4th Cir. 1968); *Electrical Workers v. Westinghouse Elec. Corp.*, 48 F.R.D. 298, 299 (S.D.N.Y. 1969); *accord, Oppenheimer Fund Inc. v. Sanders*, 437 U.S. 340, 352n.17 (1978).

ter Serv. Corp., 70 F. 2d 297, 299 (2d Cir. 1934), *aff'd*, 293 U.S. 449 (1935); *Kulukundis Shipping Co. S/A v. Amtorg Trading*, 126 F. 2d 978, 989 (2d Cir. 1942); *Martin Marietta Aluminum, Inc. v. General Electric Co.*, 586 F.2d 143, 146 (9th Cir. 1978); *see also Machinists Aircraft Lodge 703 v. Curtiss-Wright Corp.*, 169 F.Supp. 834, 841 (D.N.J. 1959); *Kastanias v. Nationwide Auto Transporters, Inc.*, 390 F.Supp. 721, 722 (W.E.Pa. 1975). Thus, the instant collective bargaining agreement requires the "aggrieved party" to initiate proceedings before a board of adjustment, which is a condition precedent to arbitration. The mere assertion that Burton's exclusive remedy existed under the grievance and arbitration provisions explicitly signalled recognition by the District Council and Local 1340 of the mutual obligations existing thereunder.

The imposition of a duty to demand *immediately* arbitration creates an incentive for parties to take disputes, which should be resolved through the grievance and arbitration provisions of collective bargaining agreements, directly to court. The incentive, as noted, is the hope that the litigation may present some fortuitous "equitable defense" to the duty to arbitrate. Instantly, Burton stumbled upon such a defense even while evading the obligation to arbitrate its claim and while such obligation was properly at issue in clear and unmistakable terms. Prior to the instant decisions, no obligation existed for a party claiming an arbitration defense to immediately move for a stay pending arbitration as a condition precedent for the maintenance of its arbitration defense.[8] If litigants such as the District Council and Local 1340 are, as held by the Court of Appeals, required to utter magic words or engage in

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[8]This Court has repeatedly recognized that courts dealing with labor management parties cannot adopt formalistic rules which defeat the arbitration obligation. To sanction it here will ensure the efforts of some labor management parties to proceed directly to court in furtherance of a desire to avoid an arbitration obligation.

formalistic pleading rituals not included under the Federal Rules of Civil Procedure or even adumbrated in this Court's decisions, the parameters of such requirement should be definitively established. Moreover, the District Council and Local 1340 believe that neither magic words nor formalistic rituals are required under the Federal Rules or relevant decisional authority and that the Court of Appeals' reasoning is patently erroneous.

V.

In summary, the District Council and Local 1340 believe that the Court of Appeals' decision is inconsistent with the decisions of other circuits and that it failed to accord proper weight to the strong federal policy favoring arbitration of labor disputes. Where, as here, the arbitration defense has been properly raised, preserved and consistently maintained, it is incongruous with notions of modern pleading practice to hold that such defense has been constructively waived. Finally, a finding of waiver under such circumstances undermines the federal policy favoring arbitration of labor disputes by effectively rewarding litigants who improperly solicit judicial involvement in disputes subject to mandatory and binding arbitration under collective bargaining agreements. The Court of Appeals' decision creates confusion in an area of critical concern to employers and labor organizations, and such confusion should be dispelled by this Court.

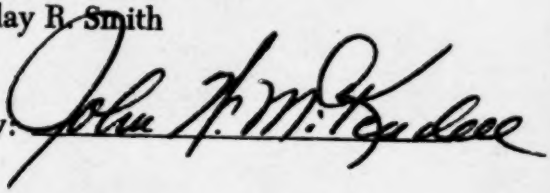
CONCLUSION

The Petitioners respectfully request the Court to issue a

writ of certiorari to the Tenth Circuit Court of Appeals for review of its decision herein.

Respectfully submitted,

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